Circuit Court for Frederick County
Case No. 10-K-17-059618

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1957

September Term, 2017

DEMETRIUS ANTJUAN BEYNUM

v.

STATE OF MARYLAND

Wright,
Arthur,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: August 14, 2018

Demetrius Antjuan Beynum, appellant, was convicted by a jury sitting in the Circuit Court for Frederick County of second-degree child abuse and second-degree assault. After merging the latter conviction into the former, the court sentenced him to 15 years of imprisonment, all but 18 months suspended, and five years of supervised probation with conditions upon his release from prison. Appellant raises three questions on appeal, which we have slightly rephrased:

I. Did the sentencing court err when it imposed as a condition of probation that appellant not have any contact with his son/the victim, absent a contrary order from an equity court?

II. Did the trial court err when it allowed a State's witness to allegedly render an expert opinion about the cause of the injuries to the victim when the witness was not disclosed in discovery as an expert and not admitted as an expert at trial?

III. Did the trial court err when it precluded the defense from calling a witness not disclosed to the State until the first day of trial?

For the following reasons, we shall affirm the judgments.

FACTS

Appellant and Cheryl Beynum were married in 2003, and their only child, Demetrius Beynum, Jr., was born on July 30, 2005.[1] The event that gave rise to the instant charges occurred during an altercation between appellant and his then eleven-year-old son on the evening of February 18, 2017. Testifying for the State were Ms. Beynum, Demetrius, the triage nurse at the attending hospital, and several police officers. The theory

[1] Because both appellant and his son have the same name, we shall hereinafter refer to the victim as "Demetrius."

of defense was appellant disciplined his child in an appropriate manner, and the witnesses against him were not credible. Appellant was the sole witness for the defense.

On the evening of February 18, 2017, the Beynums went to a local restaurant for dinner. Upon entering, Ms. Beynum asked Demetrius if he wanted to look at the buffet bar to determine if he wanted to stay and eat, but he said no. Demetrius, who was eleven years old, had been diagnosed with "autism spectrum disorder" and anxiety, both of which cause him to have difficulty in social situations, to become easily frustrated and upset, and to have limited abilities to express himself and communicate with others.

When Demetrius refused to look at the buffet, his mother went alone. According to Demetrius, while his mother was gone, appellant said something to him, which he could not remember, and he responded by telling appellant, "[I]f you do that I'll slap the shit out of you." When Ms. Beynum returned from the buffet bar, appellant announced that they were going home. They then returned to their car. Ms. Beynum drove home while appellant sat in the front passenger seat and Demetrius sat in the passenger seat behind appellant. The family was silent for the 15-minute drive home, except for appellant telling Demetrius, "[Y]ou better be ready to slap the shit out of me."

According to Ms. Beynum and Demetrius, when Ms. Beynum stopped the car in front of their townhouse, appellant unbuckled his seat belt, climbed between the two front seats, and repeatedly hit Demetrius in the head. Demetrius testified that appellant hit him hard, at least five times with his hand, and repeatedly in the same area, around his left temple. During the attack, Demetrius was screaming and Ms. Beynum was yelling for appellant to stop. Appellant then wrestled with Demetrius for his cell phone, which was in

his pocket. During the altercation for the phone, the car was shaking back and forth, and appellant shoved Demetrius, who was still in his seat belt, up against the interior of the car. When appellant finally obtained Demetrius' cell phone, he turned to his wife and told her that she better not say anything or he would take her cell phone too. Appellant then exited the car and went into their house.

Ms. Beynum spoke to Demetrius, who was hyperventilating and sobbing. Demetrius told her that his head hurt, and she could see welts forming on the side of his head. Ms. Beynum went into the house and told appellant that she was taking Demetrius to the hospital. She asked appellant to come with them, but he refused. She returned to the car and drove Demetrius to a hospital.

The pediatric triage nurse at the attending hospital testified that upon meeting Ms. Beynum and Demetrius, Ms. Beynum told her what had happened because Demetrius was crying and too upset to speak. She then examined Demetrius and observed swelling to the left side of his head. He also complained of a headache and pain when the area was touched. The police were called to the hospital. When the responding officer arrived, she spoke to Ms. Beynum and then Demetrius, who was initially curled into a fetal position on the examining table. The officer noted that Demetrius had a contusion in the area around his left temple and that the area was red.

While at the hospital, appellant texted Ms. Beynum several times. The text messages were admitted into evidence. When she texted appellant, "Can you please come to the hospital?," appellant responded, "[g]oodbye forever" and that he was waiting at

home for "the cops." At some point he texted, "So you're not coming back ever?," to which she responded, "What?"

The police went to the Beynum's house to arrest appellant. Although he initially refused to come out voluntarily, after twenty minutes and the sound of breaking glass inside the house, appellant exited the house on his own. When arrested, appellant was advised that he was being charged with second-degree child abuse. En route to the police station, appellant told the transporting officer, "I'm not passing the buck on what I did and I take responsibility for this."

Two months after the incident, Ms. Beynum filed for divorce and custody of Demetrius. At the time of trial on the instant charges, about seven months after the incident, she had been awarded full custody of Demetrius, but the divorce had not yet been finalized.

Appellant testified in his defense. He repeatedly characterized himself as the disciplinarian in the house; his son as violent, defiant, and a liar; and his wife as manipulative, abusive, and a liar. As to the specific incident, he testified that while at the restaurant he was communicating by hand signals to his son that he disapproved of his behavior. When they arrived home, he leaned in close to tell his son that he should be more respectful to his mother. In response, Demetrius swatted at him, and then they began to "tussl[e]." During his testimony, appellant alternated between denying touching Demetrius at all and admitting that he touched him, but only lightly, "incidentally." Appellant characterized the transporting officer, whom he knew from past contact, as a liar. Appellant explained his statement to the transporting officer that he would take

responsibility for his actions, not as a reference to the interaction between himself and his son, but because upon his arrest he was upset and wanted to vomit, so he told the officer that if he did vomit in the officer's car, he would take responsibility.

DISCUSSION

I.

Appellant argues that the sentencing court erred when it imposed as a condition of probation that he not have contact with his son, absent a contrary order from an equity court. Appellant argues that this condition was illegal and unreasonable because it operates as a "near termination" of his parental rights without due process. The State initially claims that appellant has not preserved his argument for our review because he made no objection below. The State further argues that even if the issue is preserved for our review, the court did not err.

A defendant may challenge an illegal sentence at any time. Md. Rule 4-345(a). Moreover, "'an illegal condition of probation can be challenged as an illegal sentence.'" *Goff v. State*, 387 Md. 327, 340 (2005) (footnote omitted) (quoting *Walczak v. State*, 302 Md. 422, 426 n.1 (1985)). "[W]hen the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court." *Walczak*, 302 Md. at 427. Applying the above law to the argument presented, appellant has preserved his argument for our review, even though he did not object below.

Md. Code Ann., Crim. Proc. Art., § 6-221 provides that upon conviction, a sentencing court may "suspend the imposition or execution of sentence and place the

defendant on probation on the conditions that the court considers proper." "It is well established that probation is considered to be a matter of grace and an act of clemency toward one who has violated the law." *Meyer v. State*, 445 Md. 648, 679 (2015) (citations omitted). Whether a condition of probation is an illegal sentence is a question of law, which we review de novo, while the actual condition of probation we review under an abuse of discretion standard. *Meyer*, 445 Md. at 663 (citations omitted). Even though a trial court has broad discretion to impose conditions on probation, that power is not unlimited. *Bailey v. State*, 355 Md. 287, 294 (1999) (citations omitted).

In *Allen v. State*, 449 Md. 98 (2016), the Court of Appeals set out the analytic framework for determining the appropriateness of a condition of probation that infringes upon the ability to parent. In that case, Allen was convicted of sexually abusing his step-daughter, and at sentencing, the court imposed on his probation a no-unsupervised-contact with minors condition, which would include his minor son. *Allen*, 449 Md. at 101. Allen appealed the condition of probation, arguing that it illegally infringed on his fundamental right to parent his child. The Court disagreed and affirmed.

The Court held that no heightened scrutiny was required to review whether a condition of probation infringes upon the fundamental right to parent because the right to raise one's child is not absolute. *Id*. at 113-115, 118-19. The Court noted that in Maryland "probationers do not enjoy the breadth of constitutional rights that are enjoyed by law abiding citizens[,]" and probation is an act of clemency, giving a defendant more liberties that he would have while imprisoned. *Id*. at 118-19 (citations omitted). The Court then concluded that the standard of scrutiny required when reviewing whether a condition of

probation infringes on the right to parent is whether the condition is "reasonable and ha[s] a rational connection to the offense." *Id.* at 120 (quotation marks, brackets, and citation omitted). Finding the no-unsupervised-contact condition reasonable and rationally connected to the offense for which Allen was convicted, the Court affirmed the condition of probation.

Although no pre-sentence report was ordered at appellant's sentencing hearing, both sides took the opportunity at the hearing to highlight key factors for the court to consider in imposing its sentence. The State related appellant's past criminal history. In 2011, appellant entered into a guilty plea to attempted first-degree arson, stemming from a "parking dispute" with the resident of an apartment complex that he was visiting. The State explained that when the police arrived, appellant's car was being towed from the complex and appellant was seen "screaming and jumping up and down stating that he was just robbed." Appellant left the area but returned about an hour later with a gas can containing gasoline, that he poured on and all around the apartment door of the resident in whose parking spot appellant had parked. The resident's husband, who was inside the apartment, chased appellant away. The police and fire marshall were called, and after assessing the situation, "[i]ndicated that there was enough gasoline . . . that if ignited it would have caused significant damage." Appellant later violated his probation in that case. The State related that appellant also had a 2015 case where he assaulted a neighbor that was "ultimately [] placed on the docket in the District Court[.]" The prosecutor related that although appellant was ordered to participate in anger management classes and perform

community service in that case, he had not presented proof that he had completed those programs to the Attorney General's Office, as he was obligated to do.

The State related that appellant also had a number of peace orders granted against him, and that he was banned from all Frederick County educational facilities, explaining:

> In addition to the defendant's criminal history, there are a number of prior peace orders that have been taken out and granted against this defendant. In 2015, I count five from neighbors, one from an employer, a former employer after the defendant was discharged. One of them I can recall Ms. Beynum was present at. She was at Verizon or Sprint phone store and she was attempting to get something [settled] with her account. It didn't really have anything to do with the defendant, although he was there. And he created such a disturbance there that the police had to be called and he had to be removed from the building.
>
> There are incidents that I have provided defense counsel with where he has been completely banned from any school property and that still is in effect and that's because of his behavior. The letter to him written by the executive director, Tracy Lewis, school administration indicated that on May 22nd, 2014, he came to his son's school, disrupted the school system operations, demonstrated threatening and aggressive behaviors. He then came to the school building, Frederick County Public School building headquarters, and created another disturbance. And that led to him being not only banned from the school, his son's school but, as I said, from the County educational facilities.

The State then related a recent incident in which appellant had threatened his wife during their recent custody hearing, stating:

> Ms. Beynum and the defendant were present in this courthouse for a domestic custody matter for a hearing on that. Ms. Beynum tells me that she was sitting on a bench in the area waiting for the proceeding. That the defendant walked with someone else close enough within hearing range of Ms. Beynum – and I have this in quote[s] – and he said loud enough for her to hear I'm tired of all her lies. But that's okay. There is a bullet for her.

Ms. Beynum also addressed the court and related how appellant's actions had affected her and Demetrius, stating: "It has impacted every aspect of our day from the

moment we wake up until the moment we go to sleep as we arm ourselves in our house and worry about whether or not we are going to be safe through the night." She continued:

> [Demetrius] has a hard time sleeping at night. He now has to sleep with a light in his room. He won't walk in rooms that are dark. He gets scared when the dog barks at night again because he thinks that there is someone prowling around our house and knocking on our door. He is worried that, you know, the things that have happened to him are part of his genetics and that he is going to turn out to be the same way when he is an adult. He is afraid to go to places that he used to love to go like the park because he is afraid to be alone in places by himself when he is at the park because he thinks his father is going to come and try to attack him while he is there.

She also spoke about the tremendous strides Demetrius has recently made in school – that he is currently mainstreamed at school and has made the honor roll two terms in a row.

In response, defense counsel denied that appellant had threatened Ms. Beynum with a bullet during their custody proceedings. He also stressed that appellant should be sentenced for the single act of assault. He advised the court that appellant wants to "move forward" and that he wants "to participate in his son's life when it is appropriate[.]" Appellant briefly addressed the court and stated, among other things, that he was: "[r]eally apologetic about just the entire circumstance of this ordeal" and that he had sacrificed much for his family.

After hearing from both parties, the court merged appellant's conviction for second-degree assault into his conviction for second-degree child abuse, and then sentenced appellant to 15 years of imprisonment, all but 18 months suspended, and five years of supervised probation upon his release from prison. The court attached conditions to appellant's probation. Among other things, appellant is to: (1) attend and successfully complete mental health treatment; (2) be evaluated for the abuse of alcohol and drugs; and

(3) attend and successfully complete any recommended drug treatment programs. Additionally, the court ordered that appellant have no contact with Ms. Beynum or Demetrius "subject to any modifications to that that a Domestic Relations Court would make."

Appellant argues that the condition on his probation that he not have any contact with his son is unreasonable and should be vacated. We disagree. We note that the condition on his probation requires that he have no contact with his son, *unless* modified by an equity court. Therefore, contrary to appellant's intimation in his appellate brief, this is not a blanket unalterable condition. The condition may change based on what an equity court believes is appropriate, presumably taking into consideration, among other things, the work, if any, appellant undertakes to modify his violent reactions to situations and Demetrius's need to feel safe in his father's presence.

We are persuaded that the no contact unless modified by an equity court condition is reasonable and rationally related to the offenses for which appellant was convicted. Appellant contends that the condition is not reasonable. To support his argument, he minimizes his criminal behavior and points out that it was a "single incident," that he did not cause "life-threatening injuries," and that his son is difficult to raise. His understanding of the event and how it has affected Demetrius appears very limited. Given the findings at trial and the information presented at the sentencing hearing, including appellant's history of disproportionate and violent behavior, we have no difficulty in holding that the condition was reasonable under the circumstances. Moreover, the condition is rationally related to the offenses for which appellant was convicted – second-degree child abuse and second-

degree assault of Demetrius. We note that a "no contact of the victim" condition is not an uncommon condition of probation involving personal, physical crimes where the parties know each other.

In sum, we are persuaded that the sentencing court acted reasonably and within its discretion when it imposed the no contact unless modified by an equity court condition on appellant's probation. *See Propriety of conditioning probation on defendant's not associating with particular person*, 99 A.L.R.3d 967 (1980, 2018 Cum.Supp.). *Cf. Howe v. State*, 25 N.E.3d 210, 215 (Ind. Ct. App. 2015) (holding that the condition of probation prohibiting the defendant from having any contact with his toddler was valid, even though child was not physically attacked during the altercation that resulted in defendant's battery conviction, noting that the defendant may petition the divorce court for a parenting time order and then request the criminal court for relief from the no contact order to comply with any parenting time ordered). *See also Diorec v. State*, 295 P.3d 409, 414 (Alaska Ct. App. 2013) (probation condition that defendant have no contact with his step-daughter/victim and her immediate family, except as allowed by the court in defendant's divorce proceeding, following defendant's conviction for unlawful exploitation of a minor); *State v Whitchurch*, 577 A.2d 690, 693 (Vt. 1990) (upholding a condition of probation which prohibited probationer, who was convicted of lewd and lascivious conduct with his daughter, from residing with or contacting his children without approval by probation officer); *People v. Hyatt*, 18 Cal.App.3d 618, 626 (Cal. Ct. App. 1971) (reviewing court held that probation had been properly conditioned on the defendant's not seeing his children until the question of visitation had been determined by the court having

jurisdiction of the divorce proceedings, where the defendant had been convicted of taking his children from his wife in whose custody they had been placed).

II.

Appellant argues that the trial court erred when it allowed the State to elicit expert testimony from the attending pediatric triage nurse that the victim's injuries were consistent with being struck by a person. Appellant argues that the testimony was inadmissible because the witness was never disclosed as an expert in discovery nor qualified as an expert at trial. The State responds that the trial court properly admitted the testimony, but even if the trial court erred in admitting the testimony, the error was harmless.

On direct examination, the triage nurse testified that after Ms. Beynum explained what had happened, she then examined Demetrius. The nurse explained the injuries she observed, and the following colloquy then occurred:

> [THE STATE]: Okay, all right. Now I'm going to ask you a hypothetical. Assume as true that Demetrius was struck in the side of his head several times by a human, would those injuries be consistent with that event?
>
> [DEFENSE COUNSEL]: And I'll object, Your Honor.
>
> [THE STATE]: The injuries that you saw?
>
> THE COURT: The objection is noted. Overruled.
>
> THE WITNESS: Yes.

On cross-examination, defense counsel followed up on the hypothetical and asked whether "the tenderness and pain and headache assuming he's an autistic child that may fall on the floor or may hit his head on the wall or a car door or car window, is that consistent with what you saw?" The witness responded: "It could be." On re-direct the State asked, based

on defense counsel's hypothetical, whether a child could have injuries on the left side of his head if the child was sitting in the back seat with the car wall to his right side. The witness responded, "No." On re-cross-examination, defense counsel then asked: "I could give you 100 hypotheticals of what caused redness or tenderness to the left side of the head, couldn't I?" The witness responded, "Yes, you could."

Two Maryland Rules govern opinion testimony. Md. Rule 5-701, titled "**Opinion Testimony by Lay Witnesses**," provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Md. Rule 5-702, titled, "**Testimony by Experts**," provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The admissibility of both a lay witness or expert witness opinion lies largely within the discretion of the trial court, and the court's action will seldom constitute grounds for reversal. *See Warren v. State*, 164 Md. App. 153, 166 (2005) (lay opinion testimony) and *Myers v. Celotex Corp.*, 88 Md. App. 442, 460 (1991) (expert opinion testimony).

In *Ragland v. State*, 385 Md. 706, 717-18 (2005), the Court of Appeals clarified the distinction between lay and expert testimony. In that case, the State elicited testimony from two police officers, neither of whom were qualified as an expert witness, that based on

their experience they believed that they had observed a drug transaction between Ragland and another person. *Ragland*, 385 Md. at 711-14. Ragland was convicted of distribution of a controlled dangerous substance. The Court of Appeals reversed his conviction, concluding that the officers', who had not been disclosed as experts in discovery, gave inadmissible expert opinion testimony. *Id.* at 716.

In reaching that conclusion, the Court of Appeals discussed the parameters between lay and expert opinion testimony. The Court explained that lay opinion testimony was "testimony that is rationally based on the perception of the witness" and set forth examples of proper lay opinion testimony, including:

> the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. . . . Other examples . . . include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, [and] the value of one's property. (citation omitted and second ellipses added.).

Id. at 717-18 (quotation marks and citation omitted). In contrast, the Court defined expert opinion testimony as "testimony that is based on specialized knowledge, skill, experience, training, or education. Expert opinions need not be confined to matters actually perceived by the witness." *Id.* at 717. The Court stated that the "bisection" between lay opinion and expert opinion testimony is imperfect as to a witness who observed a given event and who also has specialized knowledge or skill regarding the event. *Id.* at 718. To keep clear the distinction between the two types of opinion testimony (and to prevent a party from avoiding the notice and discovery requirements regarding expert opinion testimony), the Court held that Md. Rules 5-701 and 5-702 "prohibit the admission as 'lay opinion' []

testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725 (footnote omitted).

Here, the State argues that reversal is not mandated, not because the nurse's testimony was lay opinion testimony not expert opinion testimony, but because appellant does not claim that he was "surprised" that the nurse who treated Demetrius testified as an expert *and* because the nurse clearly was qualified to testify as an expert, even though the trial court did not explicitly qualify her as an expert. We decline to affirm on those grounds. Rather, even if we were to find merit in appellant's argument, we would nonetheless affirm because any error was harmless.

In Maryland, harmless error is governed by the standard first adopted by the Court of Appeals in *Dorsey v. State*, 276 Md. 638 (1976).

> We conclude that when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent view of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded — may have contributed to the rendition of the guilty verdict.

State v. Hart, 449 Md. 246, 262-63 (2016) (quoting *Dorsey*, 276 Md. at 659). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332 (2008)) (quotation marks and citation omitted). Maryland appellate courts have "steadfastly maintained" that the State has the burden to prove harmlessness. *State v. Yancey*, 442 Md. 616, 628 (2015). "The harmless error

standard is highly favorable to the defendant[.]" *Perez v. State*, 420 Md. 57, 66 (2011) (citation omitted).

The nurse's testimony, even if admitted in error, was harmless for two reasons. First, the testimony by the witness that the injuries were consistent with the event as described by Ms. Beynum was harmless because the parties continued to question the triage nurse regarding what could have caused the injury to Demetrius's head, and as a result the sum of her testimony was that "a hundred things" could have caused the injury to Demetrius's head. Therefore, the offending testimony as to the causation of the injury was watered down to the point of irrelevance. Second, the nurse's testimony as to the causation of the injury was cumulative of other evidence admitted at trial. Here, the responding police officer testified that when she arrived at the hospital, Demetrius told her what had happened. The following colloquy then occurred:

> [THE STATE]: Okay. And as a result of that what, if any, injuries did you see on Demetrius *that were consistent with that report*?
>
> [THE WITNESS]: On the left side of his head right around his ear it was red and raised consistent with a contusion.

(Emphasis added). Additionally, Ms. Beynum testified that after the assault she "could see welts forming on the side of [Demetrius's] face." Moreover, Demetrius himself testified that the appellant hit him hard in the head at least five times with his hand and that the assault "hurt a lot." *See Brown v. State*, 364 Md. 37, 42 (2001) (erroneously admitted evidence harmless beyond a reasonable doubt where cumulative of properly admitted evidence); *Snyder v. State*, 104 Md. App. 533, 564 (erroneous admission of testimony that echoes that of another witness harmless because merely cumulative), *cert. denied*, 340 Md.

216 (1995). Accordingly, even if the nurse's testimony was admitted in err, the error was harmless beyond a reasonable doubt.

III.

Appellant argues that the trial court erred when it precluded him from calling Brian Gray, a boarder in the Beynum household, who was not disclosed to the State in discovery. Appellant asserts that the court erred because Gray would have testified as to appellant's habit or practice of parenting Demetrius, which would have supported appellant's defense that he had acted reasonably in disciplining Demetrius. The State responds that the trial court did not err. We agree with the State.

Md. Rule 4-263, governing discovery, states that a defendant must provide the State with the name and address of each non-impeachment witness that the defendant intends to call at trial, no later than 30 days before the first scheduled trial date. *See* Md. Rule 4-263 (e)(1) and (h)(2). The Rule further provides that if the trial court finds that a party has failed to comply with this Rule, the court "*may* . . . prohibit the party from introducing in evidence the matter not disclosed[.]" Md. Rule 4-263(n) (emphasis added). The purpose of the Rule is to prevent surprise and to give the parties sufficient time to prepare their case for trial. *Jones v. State*, 132 Md. App. 657, 678, *cert. denied*, 360 Md. 487 (2000).

In fashioning a remedy for a discovery violation, the trial court should consider: "(1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 570-71 (2007) (citations and footnote omitted). This list of considerations is neither exhaustive nor rigid,

and the trial court may also consider "whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, [and] . . . the overall desirability of a continuance." *Taliaferro v. State*, 295 Md. 376, 390-91 (1983). "We review sanctions imposed for discovery violations for abuse of discretion." *Bellard v. State*, 229 Md. App. 312, 340 (2016), *aff'd*, 452 Md. 467 (2017) (citation and footnote omitted). "The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice." *Cole v. State*, 378 Md. 42, 56 (2003) (quotation marks and citations omitted).

After the State rested, appellant advised the court that it wished to call Gray as a defense witness, proffering that Gray, who was a boarder in the Beynum residence, would testify as to appellant's general habit and practice of parenting Demetrius. Although Gray had not been disclosed in discovery, defense counsel stated that he had revealed his identity to the State just before trial commenced the day before and the State had spoken to Gray. The State objected for several reasons: 1) Gray was not disclosed in discovery in a timely manner; (2) in the State's "brief conversation" with Gray the day before, Gray had only spoken of appellant's character and not of any facts related to his habit or routine parenting style; (3) that full and timely disclosure by the defense would have resulted in additional investigation by the State and a different strategy at trial; and (4) appellant's prior good parenting was irrelevant to his actions at the time of the assault. The court denied the motion, stating:

> THE COURT: [Defense counsel wishes to call Gray to testify as to the] habits of the defendant in this case. The State was notified of this witness yesterday. This case has been set for quite some time. The Maryland rules for discovery in the Circuit Court are dictated by rule 4-263 which the court

> reviewed prior to the arguments of counsel and then heard the arguments of counsel on this issue.
>
> The [S]tate is clearly at a disadvantage having this witness given to them after having timely filed a request for discovery which included a request for witnesses some time ago. For example, the State has had absolutely zero time to be able to counteract or counter any of the testimony that might come from this witness. If the witness is going to testify as to the parenting habits of the defendant, there could be myriad people . . . the State could interview to try to counteract that.
>
> This is within the sound discretion of the trial court according to the case law that I've read, including Taliaferro versus State. . . [which] basically leaves the discretion with the trial court. I do – the discovery rule was clearly not complied with. There is no evidence [th]at the defendant did anything to get the information to his counsel in a timely fashion so that it could be provided to the State. Specifically in Taliaferro the court discussed how they could have found that the defendant was diligent in his efforts in providing this information and that that diligence just paid off yesterday. But there is absolutely again in this case no evidence that . . . that's the case, that the information was provided to his attorney in any kind of timely fashion until yesterday. If this individual had been living with the parties as testified to, certainly this information could have been provided long ago.

Appellant concedes that the trial court's decision to exclude the testimony was a "close call[,]" but believes that Gray should have been allowed to testify because the State was made aware of Gray just before trial commenced and Gray's testimony was important to his case. We are persuaded that the trial court did not abuse its discretion. The trial court noted that the delay was substantial – defense counsel did not disclose Gray's name to the State until the first day of trial; appellant gave no explanation justifying the delay, which was unreasonable given that the witness was well-known to appellant; and the prejudice to the State was considerable. *Cf. Breakfield v. State*, 195 Md. App. 377, 390-91 (2010) (although preventing all three witnesses from testifying was a harsh sanction for violation of the discovery rules by the defendant who had not disclosed the witnesses to

the State until the first day of trial, we found no abuse of discretion); *Middleton v. State*, 49 Md. App. 286, 288-91 (in robbery prosecution we found no abuse of discretion in refusing to permit alibi witness to testify where notice of witness not given until the first day of trial), *cert. denied*, 291 Md. 779 (1981). Accordingly, we find no abuse of discretion by the trial court to exclude the witness.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDRICK COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.